IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 564 of 1990

The State of Maharashtra ... Appellant
(Orig. Complainant)

V/s

Kashinath Babu Kurale ... Respondent (Orig. Accused)

Shri P.S.Hingorani,APP for Appellant'

ShriMahin Pradhan for Respondent

CORAM:D.G.DESHPANDE, AND
S.R.SATHE,JJ.

DATED:2nd Feb. 2007

ORAL JUDGMENT :- (Per S.R.Sathe,J.)

1. The State of Maharashtra has preferred this appeal against the judgment and order passed by the 2nd Additional Sessions Judge, Kolhapur in Criminal Appeal No.90 of 1986 whereby the accused was acquitted of the offences punishable under Sections 376 and 506 of IPC.

2. The brief facts giving rise to this appeal are as under :

. The prosecutrix Surekha was residing at village Bhadagaon along with her parents and brothers. On 13-11-1984 at about 3-00 p.m. she had gone to the land of one Kalappa Danappa Konkeri for fetching sugar-cane leaves. When she was returning home with bundles of sugar-cane leaves, she was accompanied by her cousin sister Laxmibai. When they reached near the land of Shankar Patil accused accosted them and asked the prosecutrix to accompany him in the sugar cane filed for some time. The prosecutrix refused and accused therefore got annoyed and pushed the bundle of fodder which was on the head of Surekha. He also gave threat that if Surekha would not come in the sugar cane field he would take revenge. When Surekha's cousin sister Laxmibai also told the accused that they are from very poor family and he should not trouble them, the accused threaten to kill them. He then raised scythe towards Laxmibai. She, therefore, ran away from the said place.

3. It is the prosecution case that accused then dragged Surekha in the sugar cane field and made her to sleep in the field. He also put lungi which was with him in the mouth of Surekha and then ravished her. Thereafter prosecutrix was made free. She therefore went out of the field. When she was

standing on the road near the field, her uncle reached there. At that time the accused was also standing near about the said place. Surekha's uncle asked accused as to why he committed such things. Thereupon the accused told him that he may do whatever he wants. The prosecutrix was then taken home by her uncle. She narrated the incident to her mother and then they went to Police Patil and lodged the complaint. Police registered the crime at CR No.129 of 1984 against the accused for the offences mentioned above. Police then sent the prosecutrix for medical examination. They also attached clothes of the prosecutrix and arrested the accused. He was also sent for medical examination. The Police recorded the statement of various witnesses and after completion of the investigation submitted the charge sheet against the accused in the Court of the Judicial Magistrate, First Class, Gadhinglaj.

4. Finding that the case was under Section 376 of IPC which was exclusively triable by the Court of Sessions, the learned J.M.F.C., Gadhinglaj committed the case to Sessions Court, Kolhapur.

5. The Assistant Sessions Judge, Kolhapur framed charge Exh.1 against the accused for the offences mentioned above. The charge was read over and explained to the accused. He pleaded not guilty and

claimed to be tried. From the suggestions to PWS and from the statement of accused recorded under Section 313 of Cr.P.C. it appears that the defence of the accused was of total denial.

6. In order to bring home the guilt of the accused, the prosecution examined as many as 9 witnesses consisting of 3 pancha witnesses viz. :

i. Shankar Patil, Exh.9
ii.Bharat Gadase, Exh.12
iii.Kashinath Murti Exh.14.

The prosecution has also examined :

i. Surekha Taral, Exh.17,
ii. Bhima Taral, uncle of Surekha, Exh.19
iii. his daughter Laxmibai Taral, Exh.20,
iv. Nagumahanti Vyakeshrao, Medical Officer,Exh.21,
v. Police Patil, Bhimrao Gholrakhe Exh.24 and the
vi. Investigating Officer, CIP, Manohar Karpate, Exh.25.

The prosecution also produced certain documents including panchanamas, medical certificate of prosecutrix and accused and C.A. report.

7. After considering the evidence adduced by the

prosecution, the learned Assistant Sessions Judge came to the conclusion that the prosecution has proved the charge under Section 376 of IPC. He, therefore, convicted the accused for the said offence and sentenced him to suffer r/i for 2 years and to pay fine of Rs.500/- and in default to suffer r/i for one month and for the offence punishable under Section 506 the accused was convicted and sentenced to suffer r/i for one month and to pay fine of Rs.100/- in default to suffer r/i for 7 days. Both the substantive sentences were to run concurrently.

8. Being aggrieved by the said judgment and order the accused preferred Criminal Appeal No.90 of 1986 in the Sessions Court, Kolhapur. After hearing arguments of both sides, the learned Additional Sessions Judge came to the conclusion that the prosecution has not proved the charge levelled against the accused and the order passed by the Assistant Sessions Judge was wrong. He therefore allowed the appeal and acquitted the accused of the offences under Section 376 and 506 of IPC.

9. Being aggrieved by the above order the State of Maharashtra has filed the present appeal.

10. In this appeal before us, Mr.Hingorani, learned APP submitted that the learned Additional Sessions Judge has not properly appreciated the evidence on

record and has also failed to give due weightage to the medical evidence. He, therefore, submitted that the appeal be allowed and the accused be convicted for the offences punishable under Sections 376 and 506 of IPC.

11. As against this, Shri Mahin Pradhan, learned Advocate appointed by this Court to defend the accused supported the judgment and order passed by the learned Additional Sessions Judge and submitted that the appeal be dismissed.

12. The prosecution mainly relies on the evidence of the prosecutrix Surekha Exh.17, Laxmibai Exh.20 and Surekha’s uncle Bhima Taral Exh.19.

13. Surekha has stated in her deposition that on the day of incident at about 3-00 p.m. she along with her cousin sister Laxmibai had gone to the field of Kallappa Konkari for bringing fodder and after removing sugar cane leaves both of them were returning home, with bundle of fodder on their head, when they reached near the field of Shankar Patil, accused accosted them and asked Surekha to come in the sugar-cane filed for some time. When she refused, accused gave threat and also raised scythe which was in his hand. He also gave threat to Laxmibai and as a result of the same Laxmibai ran away from the said

place. She has further stated that thereafter accused forcibly took her in the field. He dragged her and made her to lie in the field. She has also stated that at that time he had put lungi in her moth and thus as a result of her mouth being gagged she was unable to raise any shout. She has also stated in detailed as to how the accused committed rape. However, firstly, it must be noted that it is very difficult to belive that when Surekha was accompanied by Laxmibai the accused would dare to drag her in the field and would take the risk of the incident being informed by Laxmibai to the parents of Surekha and to Police.

14. Though the prosecutrix has stated that accused had gagged her mouth by putting lungi in her mouth we find that she has not stated accordingly when she lodged the complaint before the Police. So, to that extent there appears to be some improvement in the story given by the prosecutrix. This story has been developed obviously because to meet out the situation that other persons had no occasion to hear her shout.

15. Witness Shankar Patil Exh.9, in whose filed the alleged incident has taken place has stated that since 8 days prior to the incident the work of cutting sugar cane was going on in his field and about 8-10 persons were employed for the same and they were carrying on

the said work in the field. When such was the position, there was every possibility of those persons coming to the spot after hearing the cry of the prosecutrix. But we find that none of them had come to the spot even at a time when accused gave push to her in fallen down her bundle of fodder and she had raised cry. So, this also creates some doubt about the version of the prosecutrix.

16. Withness Laxmibai Exh.20 has stated that when accused asked Surekha to come in the sugar cane field and Surekha refused she also told accused that he should not do anything as they belong to poor family but accused gave threat that he would kill her and as a result of the said threat she ran away from the said place and went to the house of Surekha and informed Surekha's mother Tangawa about the same and then she (Laxmibai) and Tangawa went to the field where the accused had met them. She has further stated that after reaching there she noticed that bundles of fodder which were lying at the said place when she had left the place were not there. Not only that but even Surekha was not seen at the said place. They in fact gave a call for Surekha but nobody responded. Hence both of them returned home and then they informed this incident to Surekha's uncle Bhima Taral Exh.19. He therefore again went to the field of Shankar Patil and at that time he found that Surekha was standing on the

road by the side of the field and the accused was standing at a distance of about 20 feet. Witness Bhima Taral has stated that at that time Surekha told her about the incident and the rape committed by the accused on her. Thereafter witness Bhima Taral asked accused his explanation about his act but the accused told him that he may do whatever he desires. Now, if we take into consideration the evidence of these two witnesses viz. Laxmibai and Bhima Taral and in particular, their say that when Laxmiabi had returned to field along with Tangawa, Surekha was not found there but subsequently she was found standing on the road by the side of the said field by Bhima Taral, the story of rape does not appear to be true. It has come on record that distance between the place where the alleged incident took place and the house of Surekha or Bhima is about one and half k.m.. Surekha herself has stated that act of rape was committed by the accused within 5/10 minutes. She herself has stated that after the rape was committed she was made free. Naturally, the question arises what Surekha was then doing therefor a period of about one hour or so after the accused committed the alleged act of rape. It is not her case that after the alleged act of rape was committed, she was prevented by the accused from going away from the said place or as a result of the said alleged act she was not in a position to leave the said place. On the contrary, we find that Laxmibai

has stated that when she and Tangawa had gone to the said field and given call for Surekha, there was no response. Then again Laxmibai returned home and then Bhima Taral reached to the said place. So, this time period was atleast of 1 1/2 hours. The very fact that during all this time Surekha was at the same place and she did not run away from the said place after the time she was made free by the accused suggests that in all probabilities Surekha was consenting party. The alleged act of sexual intercourse, if at all had taken place must have taken place with the consent of Surekha.

17. It is pertinent to note that though Surekha has stated that she resisted the accused when accused tried to commit rape, doctor did not find any injuries on her buttock and on hands. Dr.Nagumathanti Vyankateshrao Exh.21 has stated that if a woman would have resisted while she was being raped at a place like the sugar cane filed then there would have been different type of injuries on the person of the victim. However, in the instant case doctor did not find any such injuries on the person of Surekha. It is true that some scratch marks were found on the chin and arm of Surekha but doctor has said that it is possible even due to sugar cane leaves while moving in the field. Besides this, the doctor has also stated that such injuries can be self implicted also. It is

worth to note that doctor has stated that he examined the prosecutrix Surekha on 14-11-1984 at 10-00 a.m. While we find that she lodged the complaint on 14-11-1984 at about 8-30 p.m. It is not the case of the prosecution that Surekha on her own had gone to doctor or that somebodyelse had taken her to doctor. So, under such circumstances this discrepancy in the time of examination of Surekha by doctor also creates some doubt about the genuineness and reliability of the said evidence.

18. It is pertinent to note that according to Police they had sent Surekha to doctor informing that it was a case of rape. Even then we find that doctor has not at all given any specific opinion as to whether after examination of Surekha it was noticed that she was raped. Merely because some liquid white discharge was found at the time of her vaginal examination it cannot be said that she was raped at that time. This is obviously because the doctor himself has stated that finding of such liquid is possible even if there is any infection. Besides this if really there would have been forcible sexual intercourse as stated by the prosecutrix Surekha, then certainly there would have been some internal injuries. However, the doctor has not stated that he found any such injuries. He has not even stated that on medical examination it was noticed that there was penetration. So, medical

evidence also does not support the prosecution version and on the contrary it suggests that Surekha must have gone with the accused with her consent.

19. Though it was alleged by the prosecution that at the relevant time Surekha was below 16 years of age, the prosecution has not at all adduced any evidence in that behalf. It was in fact necessary for the prosecution to produce the birth extract of Surekha or to give any other evidence in that behalf. It was also necessary to carry out ossification test but that was not at all carried out. On the contrary, we find that even at the time when doctor examined Surekha she disclosed her age as 16. In witness box she has also stated her age 16 and in complaint also she has stated her age 16. Under such circumstances the learned Additional Sessions Judge has rightly held that prosecution has also not proved that at the relevant time Surekha was below 16 years of age.

20. Taking into consideration the above mentioned state of evidence, the learned Additional Sessions Judge has held that evidence of prosecutrix Surekha as well as other 2 witnesses viz. Laxmibai and Bhima Taral does not inspire confidence and the prosecution has failed to prove beyond reasonable doubt that accused committed rape on Surekha. The view taken by the learned Additional Sessions Judge while acquitting

the accused cannot be said to be perverse or not borne out from the evidence on record. It is well settled that in an appeal against acquittal, if it appears that the view taken by the lower court is possible then there is no need to interfere with the order of acquittal.

21. In this view of the matter, we are of the considered view that there is no need to interfere with the order passed by the learned Additional Sessions Judge, Kolhapur.

22. Hence the appeal is dismissed. The bail bond of the accused stands cancelled.

23. We quantify the fees of appointed Advocate (Mr.Mahin Pradhan) at Rs.500/-.

(D.G.DESHPADNE,J.)

(S.R.SATHE,J.)